

1 Michael H. Bierman, State Bar No. 89156  
2 Jeffrey D. Wexler, State Bar No. 132256  
3 Michael E. Pappas, State Bar No. 130400  
4 LUCE, FORWARD, HAMILTON & SCRIPPS LLP  
5 601 S. Figueroa, Suite 3900  
6 Los Angeles, California 90017  
7 Telephone: 213.892.4992  
8 Facsimile: 213.892.7731  
9 E-Mail: mbierman@luce.com  
10 mpappas@luce.com  
11 jwexler@luce.com

12 Attorneys for Plaintiff and Counterdefendant National Credit Union Administration  
13 Board As Liquidating Agent For Western Corporate Federal Credit Union

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16 WESTERN DIVISION

17 NATIONAL CREDIT UNION  
18 ADMINISTRATION BOARD AS  
19 LIQUIDATING AGENT FOR  
20 WESTERN CORPORATE FEDERAL  
21 CREDIT UNION,

22 Plaintiff,

23 v.

24 ROBERT A. SIRAVO, TODD M. LANE,  
25 ROBERT J. BURRELL, THOMAS E.  
26 SWEDBERG, TIMOTHY T. SIDLEY,  
27 ROBERT H. HARVEY, JR., WILLIAM  
28 CHENEY, GORDON DAMES, JAMES  
P. JORDAN, TIMOTHY KRAMER,  
ROBIN J. LENTZ, JOHN M. MERLO,  
WARREN NAKAMURA, BRIAN  
OSBERG, DAVID RHAMY and  
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**NOTICE OF MOTION AND  
MOTION OF PLAINTIFF AND  
COUNTERDEFENDANT  
NATIONAL CREDIT UNION  
ADMINISTRATION BOARD AS  
LIQUIDATING AGENT FOR  
WESTERN CORPORATE  
FEDERAL CREDIT UNION TO  
STRIKE AFFIRMATIVE  
DEFENSES IN DEFENDANTS'  
AMENDED ANSWERS**

Date: January 9, 2012  
Time: 8:30 a.m.  
Courtroom: 10

1 TO DEFENDANTS AND COUNTERCLAIMANTS, AND TO THEIR  
2 ATTORNEYS OF RECORD HEREIN:

3 PLEASE TAKE NOTICE that on January 9, 2012, at 8:30 a.m., or as soon  
4 thereafter as the matter may be heard before the Honorable George H. Wu, United  
5 States District Judge, in Courtroom 10 of the United States Courthouse, 312 North  
6 Spring Street, Los Angeles, California 90012, plaintiff and counterdefendant  
7 National Credit Union Administration Board as Liquidating Agent for Western  
8 Corporate Federal Credit Union (the "NCUA") will, and hereby does, move  
9 pursuant to Fed. R. Civ. P. 12(f) to strike the following affirmative defenses in the  
10 Amended Answers of defendants and counterclaimants Robert A. Siravo and  
11 Thomas E. Swedberg [Docket 190], Timothy T. Sidley [Docket 191], Robert John  
12 Burrell [Docket 192], and Todd M. Lane [Docket 193] (collectively the "Officer  
13 Defendants"):

14 (1) All affirmative defenses that are based wholly or partially  
15 upon the alleged pre-failure conduct of the NCUA as regulator because  
16 claims or defenses based upon pre-receivership actions of regulators are  
17 legally insufficient. Specifically, the NCUA moves to strike without  
18 leave to amend:

19 (a) Siravo and Swedberg's First Affirmative  
20 Defense of Ratification, Consent, Approval,  
21 Acquiescence, and Participation by the NCUA, *see* Docket  
22 190, ¶¶ 245-52;

23 (b) Lane's Second Affirmative Defense of  
24 Consent, Approval, Acquiescence, Ratification, &  
25 Participation by the NCUA, *see* Docket 193, ¶¶ 246-47;  
26 and

27 (c) Sidley's Eleventh Affirmative Defense of  
28 Estoppel, *see* Docket 191, ¶¶ 277-78.

1           (2) all references in the Officer Defendants' affirmative  
2 defenses to the conduct of the NCUA, its personnel, and examiners  
3 because claims or defenses based upon pre-receivership actions of  
4 regulators are legally insufficient. Specifically, the NCUA moves to  
5 strike without leave to amend:

6           (a) the phrase "NCUA personnel and examiners"  
7 from Siravo and Swedberg's Sixth Affirmative Defense of  
8 Reliance on Others, *see* Docket 190, ¶¶ 275-76;

9           (b) the phrase "NCUA personnel and examiners"  
10 from Siravo and Swedberg's Seventh Affirmative Defense  
11 of Apportionment, *see id.*, ¶¶ 277-78;

12           (c) paragraphs 248-69 in their entirety, and all  
13 references to the NCUA and its agents, policies, conduct,  
14 and regulations, in Burrell's First Affirmative Defense of  
15 Consent, Approval, Acquiescence, Authorization,  
16 Ratification, *see* Docket 192, ¶¶ 247-314;

17           (d) the phrase "NCUA personnel and examiners" from  
18 Lane's Sixth Affirmative Defense of Reliance on Others, *see*  
19 Docket 193, ¶ 251;

20           (e) the phrase "NCUA personnel and examiners" from  
21 Lane's Seventh Affirmative Defense of Apportionment, *see id.*,  
22 ¶ 252;

23           (f) every reference to the NCUA and its examiners,  
24 personnel, agents and conduct in Sidley's First Affirmative  
25 Defense of Consent, Approval, Acquiescence, Participation,  
26 Ratification, *see* Docket 191, ¶¶ 246-58; and  
27  
28

1 (g) the phrase “NCUA personnel and examiners” in  
2 Sidley’s Sixth Affirmative Defense of Reliance on Professionals  
3 and Others, *see id.*, ¶¶ 267-68.

4 (3) The business judgment rule affirmative defense in each of  
5 the Officer Defendants’ Amended Answers because, as the Court has  
6 already held, officers cannot rely upon the business judgment rule. *See*  
7 Docket 110 at 9-11. Accordingly, the NCUA moves to strike without  
8 leave to amend:

9 (a) Siravo and Swedberg’s Third Affirmative  
10 Defense of Business Judgment Rule, Due Diligence and  
11 Reasonable Investigation, *see* Docket 190, ¶¶ 267-68;

12 (b) Burrell’s Second Affirmative Defense of  
13 Business Judgment Rule, Due Diligence, Reasonable  
14 Investigation, Business Custom and Usage, Candor, Good  
15 Faith, *see* Docket 192, ¶¶ 315-16;

16 (c) Lane’s First Affirmative Defense of Business  
17 Judgment Rule, Due Diligence & Reasonable  
18 Investigation, *see* Docket 193, ¶ 245; and

19 (d) Sidley’s Second Affirmative Defense of  
20 Business Judgment Rule, *see* Docket 191, ¶¶ 246-58.

21 (4) The statute of limitations affirmative defense in each of  
22 the Officer Defendants’ Amended Answers because, in each case, the  
23 Officer Defendants failed to allege facts sufficient to support their  
24 statute of limitations defenses and, instead, merely alleged statute of  
25 limitations as a legal conclusion. Accordingly, the NCUA moves to  
26 strike:  
27  
28

(a) Siravo and Swedberg's Fifth Affirmative Defense of Statute of Limitations, *see* Docket 190, ¶¶ 273-74;

(b) Burrell's Seventh Affirmative Defense of Statute of Limitations, *see* Docket 192, ¶¶ 327-28;

(c) Lane's Fifth Affirmative Defense of Statute of Limitations, *see* Docket 193, ¶ 250; and

(d) Sidley's Twelfth Affirmative Defense of Statute of Limitations, *see* Docket 191, ¶¶ 246-58.

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities filed concurrently herewith, the NCUA's Second Amended Complaint, the Amended Answers of each of the Officer Defendants, the [Proposed] Order lodged concurrently herewith, the records and files in this matter, and such further oral or written argument as may be considered by the Court.

This Motion is made following the conferences of counsel pursuant to Local Rule 7-3 that occurred on October 24, 2011 and November 3, 2011.

DATED: November 14, 2011      LUCE, FORWARD, HAMILTON & SCRIPPS LLP  
 Michael H. Bierman  
 Jeffrey D. Wexler  
 Michael E. Pappas

By: /s/ Michael H. Bierman  
 Michael H. Bierman  
 Attorneys for Plaintiff and Counterdefendant  
 National Credit Union Administration Board  
 As Liquidating Agent For Western Corporate  
 Federal Credit Union

101716427.2